

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

LOUISIANA PUBLIC SERVICE COMMISSION, MIDDLE
SOUTH UTILITIES, INC., AND LOUISIANA POWER &
LIGHT COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

1. Respondent Louisiana Commission has stated in its first question to this Court (Louisiana Commission Br. p. 2) that the procedural issue presented is whether a Court of Appeals may review an order of the Commission declining to revoke or modify an earlier order on a showing that conditions as of the date of the original order, "*or subsequent thereto*, upon which the order was predicated do not exist." [Emphasis added.] The fact is, however, that the court below did not base its decision on *subsequent* changes of condition which the Commission concedes

might constitute a basis for reopening, but relied solely on an allegation that the conditions were otherwise than shown by the record before the Commission at the time it issued its original order. Moreover, the additional procedural issue of whether the Court of Appeals can review legal determinations made in connection with the original order, upon its review of an order of the Commission denying a petition to reopen, has not been included by the respondent, although it is an integral part of this case.

2. In urging the lack of conflict between the decision below and that of the Court of Appeals for the District of Columbia Circuit in *Engineers Public Service Co. v. S. E. C.*, 138 F. 2d 936 and *Philadelphia Co. v. S. E. C.*, 177 F. 2d 720, the Louisiana Commission states: "The Court will look in vain in the *Engineers* decision for language to support the S. E. C. view that the loss must cause a serious economic impairment of the system such as to render it incapable of independent economical operation" (Louisiana Commission Br. p. 13). But surely the Court of Appeals for the District of Columbia Circuit is the best judge of the test it applied in that decision, and it pointed out in the *Philadelphia* case, in connection with its agreement with the Commission's interpretation of the term "substantial economies", that "We construed it similarly in the *Engineers* case" (177 F. 2d at 725).

The Louisiana Commission also urges that the *Engineers* case is not in conflict with the ruling below on the question of whether loss of economies to the principal system might be considered. To support this contention, respondent quotes from the language of the court to the effect that the Commission could not legally permit the continued control of "Virginia Gas" by "Virginia Electric" unless it could be found that "such continuing strength would not entail a sacrifice upon the part of the controlling utility" (Louisiana Commission Br. p. 14). Respondent apparently construes this language to mean that a loss of substantial economies which might be occasioned by divestment must be considered in relation to the principal system, as a factor in deciding whether the additional system should be retained. But a close analysis of the language of the opinion—which is phrased in double-negative form—indicates that respondent's interpretation is incorrect and that the court stated merely that *a controlled system must be divested* when its retention would result in "a sacrifice upon the part of the controlling utility." The quoted language, as construed by respondent, would be wholly inconsistent with the statement on the same page of the opinion that the substantial economies

“must relate to the healthful continuing business and service of the *freed* utility.” [138 F. 2d at 944; emphasis added.]

Respectfully submitted,

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NOVEMBER 1956.